Vathemurthy a/l Arumugam & Anor v RS Thanenthiran a/l Raman Kutty & Anor

HIGH COURT (KUALA LUMPUR) — WRIT OF EXECUTION NO WA-37WS-51–11 OF 2017
DARRYL GOON JC
3 AUGUST 2018

Civil Procedure — Interest — Judgment interest — Plaintiff obtained judgment and order for damages against defendants — Judgment and order silent on interest — Whether interest on judgment debts needed to be specifically ordered and spelt out in judgment — Whether interest on judgment debts began to run from date of entry of judgment or date of assessment of damages — Whether rate of interest 8% or 5%pa

This was an appeal by the plaintiff against the decision of the learned senior assistant registrar of 28 March 2018 in having allowed the second defendant's application to set aside a writ of seizure and sale with costs of RM2,000. On 26 August 2011, the plaintiff obtained judgment on liability against both the first and second defendants. Damages were finally assessed at RM100,000 on 21 January 2017 and an order was entered bearing that date. The judgment of the court of 26 August 2011 and the order of the court of 21 January 2017 did not state that interest would be payable on the judgment or on the amount of damages assessed and, accordingly, no rate of interest was mentioned. On 24 November 2017, the plaintiff took out a writ of seizure and sale and claimed the sum adjudged to be payable ie RM100,000 plus interest at the rate of 8% per year from 26 August 2011–25 August 2017. Therefore, the interest claimed was interest on the judgment debt and not pre-judgment interest under s 11 of the Civil Law Act 1956. The second defendant applied to set aside this writ of seizure and sale. The second defendant maintained that since no interest was ordered in the judgment or the order of the court after assessment of damages, and no rate of interest provided for, the plaintiff was therefore not entitled to any interest on the judgment sum. The learned senior assistant registrar allowed the application and hence this appeal.

Held, allowing the appeal with costs of RM500 subject to 4% allocatur:

(1) Under both O 42 r 12 of the Rules of the High Court 1980 and the Rules of Court 2012, it was expressly stated that 'every judgment debt shall carry interest'. While the rate of interest may be the subject of agreement between the parties; that every judgment debt shall carry interest was nevertheless expressly stated. As expressed, interest on a judgment debt need not be specifically ordered. The position was simply that every

judgment debt shall carry interest without more. Interest was statutorily conferred on all judgment debts. It was a right conferred and not merely an entitlement to be claimed (see para 8).

(2) In so far as interest on judgment debts were concerned, under O 42 r 12 of the Rules of Court 2012, the court had the power to award interest at such rate as may had been agreed between the parties. The court may also award interest at a lower rate than the rate determined by the Chief Justice. However, if there was neither an agreed rate nor a lower rate of interest ordered, the default rate of interest on a judgment debt was the rate determined by the Chief Justice. The same conclusion was arrived at under O 42 r 12 of the Rules of the High Court 1980, save that the default rate of interest provided was 8%pa (see para 12).

(3) The plaintiff was adjudged as having the right to damages on 26 August 2011, at the time when the Rules of the High Court 1980 were applicable. The plaintiff was entitled to interest on the damages assessed from the date that judgment was entered ie 26 August 2011 and not from the date damages were assessed, which was on 21 January 2017. The plaintiff had secured a substantive right to damages on 26 August 2011 and the prevailing default rate of interest then was 8%pa. To hold that interest on the judgment debt should be 5%pa, that being the applicable rate at the time damages was assessed, would be unfair, unjust and inconsistent with the principles enunciated. Such would be to allow a prior substantive right acquired to be diminished by a subsequent rule of procedure albeit by way of subsidiary legislation. No other rate being specified either under the judgment or the order after assessment of damages, the applicable interest rate would be the default rate under the Rules of the High Court 1980 ie 8%pa (see para 24).

[Bahasa Malaysia summary

Ini adalah rayuan oleh plaintif terhadap keputusan penolong kanan pendaftar mahkamah yang bijaksana pada 28 Mac 2018 yang membenarkan permohonan defendan kedua untuk mengetepikan writ penyitaan dan penjualan dengan kos RM2,000. Pada 26 Ogos 2011, plaintif memperoleh penghakiman liabiliti terhadap defendan pertama dan kedua. Ganti rugi akhirnya dinilai sebanyak RM100,000 pada 21 Januari 2017 dan perintah telah dimasukkan dengan tarikh tersebut. Penghakiman mahkamah pada 26 Ogos 2011 dan perintah mahkamah pada 21 Januari 2017 tidak menyatakan bahawa faedah akan kena dibayar atas penghakiman atau atas jumlah ganti rugi yang dinilai dan, dengan itu, tiada kadar faedah yang disebut. Pada 24 November 2017, plaintif telah mengeluarkan writ penyitaan dan penjualan dan mendakwa jumlah wang yang dikenakan untuk dibayar iaitu RM100,000 ditambah faedah pada kadar 8% setahun dari 26 Ogos 2011–25 Ogos 2017. Oleh itu, faedah yang dituntut adalah faedah atas hutang penghakiman dan bukannya faedah pra-penghakiman di bawah s 11 Akta

Undang-Undang Sivil 1956. Defendan kedua memohon untuk mengetepikan writ penyitaan dan penjualan. Defendan kedua berpendapat bahawa oleh kerana tiada faedah yang diperintahkan dalam penghakiman atau perintah mahkamah setelah penilaian ganti rugi, dan tiada kadar faedah yang disediakan, maka plaintif oleh itu tidak berhak atas apa-apa faedah atas jumlah penghakiman. Penolong kanan pendaftar mahkamah yang bijaksana membenarkan permohonan itu dan oleh itu rayuan ini.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM500 tertakluk kepada 4% allocatur:

(1) Di bawah kedua-dua A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980 dan Kaedah-Kaedah Mahkamah 2012, adalah secara nyata menyatakan bahawa 'setiap hutang penghakiman hendaklah mengandungi faedah'. Walaupun kadar faedah mungkin menjadi subjek perjanjian antara pihak-pihak; bahawa setiap hutang penghakiman akan mengandungi faedah walaupun dinyatakan dengan jelas. Seperti yang dinyatakan, faedah terhadap hutang penghakiman tidak perlu diperintahkan secara khusus. Kedudukannya adalah semata-mata bahawa setiap hutang penghakiman akan mengandungi faedah tanpa lebih. Faedah adalah diberikan secara statutori kepada semua hutang penghakiman. Ia adalah hak yang diberikan dan bukannya hak untuk dituntut (lihat perenggan 8).

(2) Setakat mana faedah atas hutang penghakiman yang berkenaan, di bawah A 42 k 12 Kaedah-Kaedah Mahkamah 2012, mahkamah mempunyai kuasa untuk mengaward faedah pada kadar sebagaimana yang telah dipersetujui antara pihak-pihak. Mahkamah juga boleh mengaward faedah pada kadar yang lebih rendah daripada kadar yang ditentukan oleh Ketua Hakim Negara. Walau bagaimanapun, jika tiada kadar yang dipersetujui atau kadar faedah yang lebih rendah yang diperintahkan, kadar faedah ingkar ke atas hutang penghakiman adalah kadar yang ditentukan oleh Ketua Hakim Negara. Kesimpulan yang sama telah dicapai di bawah A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980, kecuali bahawa kadar faedah ingkar yang diberikan adalah 8% setahun (lihat perenggan 12).

(3) Plaintif telah dihakimi sebagai mempunyai hak untuk ganti rugi pada 26 Ogos 2011, pada masa Kaedah-Kaedah Mahkamah Tinggi 1980 terpakai. Plaintif berhak mendapat faedah atas kerosakan yang dinilai dari tarikh penghakiman yang dibuat iaitu 26 Ogos 2011 dan bukan dari tarikh kerosakan dinilai, iaitu pada 21 Januari 2017. Plaintif telah memperolehi hak substantif untuk ganti rugi pada 26 Ogos 2011 dan kadar faedah semasa lazimnya ketika itu adalah 8% setahun. Untuk memutuskan faedah atas hutang penghakiman tersebut adalah 5% setahun, bahawa kadar yang dikenakan pada masa kerosakan itu dinilai,

A adalah tidak adil, berat sebelah dan tidak konsisten dengan prinsip yang dinyatakan. Ini akan membolehkan hak substantif terdahulu yang diperolehi untuk dikurangkan oleh peraturan prosedur yang seterusnya walaupun melalui perundangan subsidiari. Tiada kadar lain yang dinyatakan sama ada di bawah penghakiman atau perintah selepas
B penilaian ganti rugi, kadar faedah yang dikenakan akan menjadi kadar ingkar di bawah Kaedah-Kaedah Mahkamah Tinggi 1980 iaitu 8% setahun (lihat perenggan 24).]

Notes

C For cases on judgment interest, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4935–4938.

Cases referred to

D *Ab Lah bin Ali v Yong Wah Sing* [2003] 6 MLJ 555, HC (refd)
Bandar Teknik Sdn Bhd & Ors v Desa Samudera Sdn Bhd [2017] MLJU 1097, HC (refd)
Berjasa Information System Sdn Bhd v Tan Gaik Leong (t/a Juruukur Berjasa) & Anor [2017] 3 MLJ 394; [2017] 6 CLJ 251, CA (folld)
E *Gooi Hock Seng v Chuah Guat Khim* [2001] 1 CLJ 583, SC (refd)
Hunt v RM Douglas (Roofing) Ltd [1990] 1 AC 398, HL (refd)
Liau Kim Lian v Bajuria [1971] 1 MLJ 276, FC (refd)
Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156; [1982] CLJ Rep 190, FC (refd)
F *Ritz Garden Hotel (Cameron Highlands) Sdn Bhd v Balakrishnan a/l Kaliannan* [2013] 6 MLJ 149, FC (refd)
Simcoe v Jacuzzi UK Group Plc [2012] 2 All ER 60; [2012] EWCA Civ 137, CA (refd)

G **Legislation referred to**

Civil Law Act 1956 s 11
Rules of Court 2012 O 37, O 37 r 1(1), O 42 rr 12, 12A
Rules of the High Court 1980 O 42 r 12

H *(Gunaseelan & Associates) for the plaintiffs.*
(Dinesh & Co) for the defendants.

Darryl Goon JC:

I **[1]** This was an appeal by the plaintiff against the decision of the learned senior assistant registrar of 28th March 2018 in having allowed the second defendant's application to set aside a writ of seizure and sale with costs of RM2,000. For ease of reference, the parties shall continue to be referred to in their respective capacities in the suit.

[2] This case concerns interest on judgment debts. It raises the questions: (a) whether interest on judgment debts need be specifically ordered and spelt out in a judgment; (b) from when does interest on a judgment debt begin to run if there is a judgment on liability and damages are assessed subsequently; and (c) the rate of interest, if the judgment does not specify the applicable rate.

[3] On 26 August 2011, the plaintiff obtained judgment on liability against both the first and the second defendants. Damages were finally assessed at RM100,000 on the 21 January 2017 and an order was entered bearing that date. The judgment of the ourt of 26 August 2011 and the order of the court of 21 January 2017 did not state that interest would be payable on the judgment or on the amount of damages assessed and, accordingly, no rate of interest was mentioned.

[4] On 24 of November 2017, the plaintiff took out a writ of seizure and sale. In it, the plaintiff claimed the sum adjudged to be payable ie RM100,000, plus interest at the rate of 8% per year from 26 August 2011–25 August 2017, amounting to RM43,820.28. Therefore, the interest claimed was interest on the judgment debt and not pre-judgment interest under s 11 of the Civil Law Act 1956.

[5] The second defendant applied to set aside this writ of seizure and sale. The second defendant maintained that since no interest was ordered in the judgment or the order of the court after assessment of damages, and no rate of interest provided for, the plaintiff was therefore not entitled to any interest on the judgment sum. As such, it was argued that the writ of seizure and sale ought to be struck out for imposing interest, and at a specific rate, both of which were never ordered.

[6] Order 42 r 12 of the Rules of Court 2012 provides as follows:

> 12 Subject to rule 12A, except when it has been otherwise agreed between the parties, every judgment debt shall carry interest at the rate as the Chief Justice may from time to time determine or at such other rate not exceeding the rate aforesaid as the Court determines, such interest to be calculated from the date of judgment until the judgment is satisfied.

Rule 12A relates to financial transactions in accordance with Shariah and is not relevant for the purposes of this case.

[7] However, the judgment on liability was obtained by the plaintiff on 26 August 2011. The applicable rules of court at that time were the Rules of the High Court 1980. The equivalent rule applicable then was also O 42 r 12, but it read as follows:

A 12 Interest on judgment debts (O 42 r 12)

Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated from the date of judgment until the judgment is satisfied.

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[8] Under both, the 1980 and the 2012 rules, it is expressly stated that 'every judgment debt shall carry interest'. While the rate of interest may be the subject of agreement between the parties; that every judgment debt shall carry interest C is nevertheless expressly stated. As expressed, interest on a judgment debt need not be specifically ordered. The position is simply that every judgment debt *shall* carry interest without more. Interest is statutorily conferred on all judgment debts. It is a right conferred and not merely an entitlement to be claimed. In addition, unless a different rate of interest is ordered, the rate D provided in the rules shall apply as the default rate.

[9] Learned counsel for the second defendant argued that interest is a matter of discretion for the court. It follows then that if no interest was awarded, the plaintiff would not be entitled to any interest on the judgment debt. For this E proposition, the judgment of the Federal Court in *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156; [1982] CLJ Rep 190 was cited. The passage referred to in the judgment of the Federal Court was the following from Salleh Abas FJ (as he then was) at pp 161–162 (MLJ); pp 201–202 (CLJ):

F Counsel for the respondent in submitting that interest on this lump sum should be at 8% with effect from the date of trial to the date of realisation relied upon O 42 r 12 of the Rules of the High Court 1980. This order says:

> 12 Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs, G such interest to be calculated from the date of judgment until the judgment is satisfied.

Although the order is expressed in imperative 'shall', it is certainly not intended to be so; because to give effect would be incompatible with the discretionary power of the court to order interest under s 11 of the Civil Law Act 1956. We do not think H that O 42 r 12 can override the provision of the Act. This order can only mean that the Court may order interest at 8% if the court thinks that circumstances justify such rate. In no sense must this order be understood as obliging the court to award interest at 8% and 8% only. We cannot therefore accept the submission of counsel for the respondent and as such the award of interest by the learned judge is upheld.

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[10] It is clear that in that case, the Federal Court was concerned with pre-judgment interest under s 11 of the Civil Law Act 1956 which clearly confers upon the courts, discretionary power to award pre-judgment interest. As Salleh Abas FJ pointed out in that case, 'The ordering of interest to be

included in a sum awarded for damages is a judicial discretion. Section 11 of the Civil Law Act 1956 (Malaysia Act 67) gives a fairly wide discretion to the court to order interest on a sum adjudged by the court in cases where a claimant succeeds in proceedings for the recovery of debts or damages'.

[11] Section 11 states as follows:

> 11 Power of Courts to award interest on debts and damages
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> In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest as such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period *between the date when the cause of action arose and the date of the judgment:*
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> Provided that nothing in this section —
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> (a) shall authorize the giving of interest upon interest;
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> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
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> (c) shall affect the damages recoverable for the dishonour of a bill of exchange. (Emphasis added.)

Therefore, the position is that in relation to pre-judgment interest, the court has a discretion whether to award interest up to the date of judgment, and if so, the rate, subject to the proviso under s 11 of the Civil Law Act 1956.

[12] In so far as interest on judgment debts are concerned, under O 42 r 12 of the Rules of Court 2012, the court has the power to award interest at such rate as may have been agreed between the parties. The court may also award interest at a lower rate than the rate determined by the Chief Justice. However, if there is neither an agreed rate nor a lower rate of interest ordered, the default rate of interest on a judgment debt is the rate determined by the Chief Justice. In my view, the same conclusion is arrived at under O 42 r 12 of the Rules of the High Court 1980, save that the default rate of interest provided is 8%pa.

[13] Learned counsel for the second defendant further contended that if interest on a judgment debt is not ordered, the party claiming such interest would have to file a suit to recover it. For this proposition, learned counsel relied on the decision in *Bandar Teknik Sdn Bhd & Ors v Desa Samudera Sdn Bhd* [2017] MLJU 1097. In *Bandar Teknik*, there is a passage where Lee Swee Seng J, stated as follows:

> [46] In practice, most counsel would be careful to make sure it is written into the judgment of the court. If it is not, it does not mean that the successful claimant has lost his right to post judgment interest but simply that he would have to sue for it as

indeed the plaintiffs are doing now in the sessions court writ of summons.

[14] However, in *Bandar Teknik*, there was a genuine dispute as to whether post judgment interest was payable because of an order of the Court of Appeal. As the learned judge in *Bandar Teknik* pointed out:

> [4] On appeal to the Court of Appeal on 2 September 2010, the plaintiffs here were awarded damages in the Court of Appeal for the sum of RM3.29m and the defendant's claim there was dismissed. The prejudgment period was almost twelve years (22 September 1998–2 September 2010). At the suggestion of the Court of Appeal's panel, the plaintiffs agreed to limit it to six years. The principal judgment sum plus the prejudgment interest merged to form the judgment debt of RM4,919,200.
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> [14] The defendant denied that they are liable to pay the post judgment interest as they now argued that the agreed period of six years of pre-judgment interest on the judgment sum covered post judgment interest as well and demanded the return of the sum of RM154,815.01.
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> [15] The relevant part of the judgment read:
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> > All judgment sums carry interest at the rate of 8%pa from the date of filing of the counterclaim (22 September 1998) for the agreed term of six years.
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> [16] An attempt to settle the order as to whether the agreed term of six years would also include post judgment interest before the deputy registrar on the 26 November 2011 was unsuccessful. At the request of the deputy registrar a joint motion before the same panel of Court of Appeal proved unproductive as the Court of Appeal held themselves functus officio.
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> [17] The plaintiffs obtained leave to appeal to the Federal Court. However after leave was obtained and at the hearing proper, the Federal Court declined to answer the question posed as they held that the matter was fact-sensitive.

[15] Therefore, in *Bandar Teknik*, the plaintiff had to commence an action for a declaration to determine if it was entitled to post judgment interest under the order of the Court of Appeal. So that the learned judge's views are not taken out of context, it is important to note that he did express the following view in respect of O 42 r 12 of the Rules of the High Court 1980:

> [37] The words are clear. It is the default position that every judgment debt comes with and carries with it interest at the rate of 8%pa. Little wonder that any variation is only with respect to the rate of interest on the judgment debt and not with respect to forgoing interest on judgment debt. If a judgment creditor chooses not to enforce interest on a judgment debt, that then is his prerogative. The law as it stood then granted interest on post-judgment debt as of right.
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> [44] As pointed out above, the right of a successful claimant to post judgment interest is a statutory right. For that to be taken away, it must be a case where the claimant, in this case the plaintiffs here, on successful appeal to the Court of Appeal, had relinquished or waived the post judgment interest altogether.

[16] Thus it is clearly the case that the learned judge in *Bandar Teknik* held the view that the right to interest on a judgment debt is statutory in nature and there is a statutory default position catered for which applies unless agreed otherwise or ordered to the contrary. I therefore do not think the learned judge had meant that a fresh action was necessary in every case to recover interest on a judgment debt if it was not specifically provided in the judgment. It would also be both burdensome and an unnecessary use of judicial time if a fresh action has to be filed, only to recover what has already been conferred.

[17] If the default position is that all judgment debts carry interest at the rate provided, unless ordered to the contrary, when then would interest begin to run if the judgment is bifurcated such that there is a judgment on liability with damages to be assessed at a subsequent date? The answer to this question has been answered by the Federal Court in *Liau Kim Lian v Bajuria* [1971] 1 MLJ 276 by Gill FJ in the following terms:

> A judgment for damages to be assessed, or for costs to be taxed, carries interest from the date of entry of judgment and not from the date of assessment or taxation (see *Halsbury's Laws of England* (3rd Ed) Vol 22, p 72, para 1662).

[18] This principle follows the incipitur rule that has been adopted in Malaysia. In the United Kingdom, after conflicting preferences between the incipitur rule and the allocatur rule, the controversy was put to rest by the House of Lords in *Hunt v RM Douglas (Roofing) Ltd* [1990] 1 AC 398 where Lord Ackner, at paras 415F–416B, stated pointedly, '... the balance of justice favours the incipitur rule'. To this day, the inicipitur rule continues to apply in the United Kingdom (see for example the decision of the Court of Appeal in *Simcoe v Jacuzzi UK Group Plc* [2012] 2 All ER 60; [2012] EWCA Civ 137). This rule was applied in Malaysia in *Ab Lah bin Ali v Yong Wah Sing* [2003] 6 MLJ 555 following *Liau Kim Lian* after a careful analysis of the competing contentions in the United Kingdom.

[19] A similar conclusion was arrived at by the Supreme Court in *Gooi Hock Seng v Chuah Guat Khim* [2001] 1 CLJ 583 in which Abdul Malek Ahmad FCJ, delivering the judgment of the court, observed as follows:

> In *Liau Kim Lian v Bajuria* [1971] 1 LNS 63, the Federal Court had ruled that upon a true construction of O 40 r 11(2) of the Rules, interest is payable where an order directs payment of costs to be taxed, and a judgment for damages to be assessed, or for costs to be taxed, carries interest from the date of entry of judgment and not from the date of assessment or taxation.

A This was followed by the High Court in *Sam Hock Ming v Hong Leong Assurance Sdn Bhd* Civil Suit No 23–113–86 High Court Ipoh which held that as to whether interest should run from the date when an order for costs was made or from the date of allocatur in respect of such costs, the court took the view that a judgment for damages to be assessed or for costs to be taxed, carried interest from the date of the B said judgment and not from the date of assessment of damages or taxation of costs.

As stated in footnote 5 of the *Halsbury's* text referred earlier, *Pyman & Co v Burt and Bolton* [1884] WN 100 and *Landowners' West of England and South Wales Land Drainage and Inclosure Co v Ashford* [1884] 33 WR 41, were overruled by *K v K* [1977] Fam 39; [1977] 1 All ER 576 (CA) and *Eryen Warnink Besloten Vernootschap* C *v J Townsend & Sons (Hull) Ltd* [1981] 125 Sol Jo 427 but these in turn have now been overruled by *Hunt v RM Douglas (Roofing) Ltd* [1988] 3 All ER 823 which held that a litigant who has been awarded costs is entitled to interest on those costs from the date of judgment rather than the date the taxation of costs is completed.s

D **[20]** Thus where judgment is entered and the quantum is to be assessed, interest on the judgment debt is to run from the date judgment was entered and not from the date the quantum was assessed. This is also consistent with the rationale for awarding interest. As was stated by Hasan Lah FCJ, in a decision of the majority of the Federal Court in *Ritz Garden Hotel (Cameron Highlands)* E *Sdn Bhd v Balakrishnan a/l Kaliannan* [2013] 6 MLJ 149 at pp 159–160:

> [26] It is trite law that interest is not a punishment but a compensation for the party entitled to the money for being deprived of its use. Salleh Abas FJ (as he then was) sitting as a puisne judge in *Terengganu State Economic Development Corporation v Nadefinco Ltd* at p 368 opined:
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> > Interest is a sum of money representing the return for the use of the compensation for the retention by one person of a sum of money belonging to or owed to another. In essence it is regarded as representing a profit which the other person might have made if he had the use of the money or conversely the loss which he had suffered because he had not that use. In other words interest is a G compensation for the deprivation of the use of money, which he is lawfully entitled to (per Lord Wright in *Riches v Westminister Bank Ltd*). As a result of almost two centuries of development by the common law courts and the courts of equity and also by Acts of Parliament it has now become a settled principle that interest is only payable, where there is an agreement express or implied or H where the principal money has been wrongfully withheld or where there is a statute authorising the charging of interest, (per Collin MR in *Borthwick v Elderslie* SS 27 *Halsbury's Laws of England* (3rd Ed) p 8 and per Lord Herschell LC in *LCD Rly v SE Rly* quoting with approval the judgment of Lord Tenterden in *Page v Newman*).

I **[21]** Therefore to ensure that a successful litigant is not kept out of moneys that he had been adjudged entitled to, interest ought properly to run from the date of the adjudication of his entitlement, ie the date judgment was entered, and not merely from a later date when the quantum of his entitlement is

assessed. Otherwise, there would be a period between judgment and assessment for which the loss of use would not be compensated with interest. Perhaps this may also be why O 37 r 1(1) of the Rules of Court 2012, now requires the party entitled to the benefit of a judgment to apply within one month of the judgment to the registrar for directions for assessment of damages. This would avoid any unnecessary accumulation of interest to the judgment debtor's detriment due to avoidable or unjustifiable delays in assessing damages.

[22] What then is the rate of interest applicable in this case? Judgment was entered on 26 of August 2011 and the prevailing rate of interest at that time, under O 42 r 12 of the Rules of the High Court 1980, was 8%pa. Damages were assessed on 21 January 2017 and the applicable rate of interest, under O 42 r 12 of the Rules of Court 2012 was, and still is, 5%pa. Is the generally held principle that procedural rules have retrospective effect applicable such that the rate of interest to be applied is the rate when damages were assessed? The answer to this conundrum may be found in the decision of the Court of Appeal in *Berjasa Information System Sdn Bhd v Tan Gaik Leong (t/a Juruukur Berjasa) & Anor* [2017] 3 MLJ 394; [2017] 6 CLJ 251.

[23] In *Berjasa Information System Sdn Bhd v Tan Gaik Leong (t/a Juruukur Berjasa) & Anor* [2017] 3 MLJ 394; [2017] 6 CLJ 251, the appellant obtained judgment against the respondent on 7 February 2007 with damages to be assessed under the then Rules of the High Court 1980. Directions for assessment of damages were only sought on 20 May 2014. This was done under O 37 of the Rules of Court 2012. However, under O 37 r 1(1), as mentioned, such an application must be made within one month from the judgment. On the other hand, there was no similar time frame imposed in the Rules of the High Court 1980. The respondent objected saying that the application for assessment of damages was out of time. The deputy registrar upheld the objection and the application for assessment of damages was dismissed. On appeal before the learned judicial commissioner, it was argued by the appellant that the Rules of Court 1980 should apply. However, the learned judicial commissioner found favour with the respondent's contention that, being a subsidiary legislation of a purely procedural nature, the Rules of Court 2012 applied retrospectively and the appeal was dismissed. In the judgment of the Court of Appeal, Tengku Maimun Tuan Mat JCA, held as follows:

> [15] Whilst we agreed with the learned JC that the Rules of Court 2012 is a procedural law, we disagreed that simply because the Rules of Court 2012 concern procedural law, it must be applied retrospectively to the judgment dated 7 February 2007.
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> [16] In this regard, we found that the learned JC failed to consider the full effect of the case of *Sim Seoh Beng* cited by him.

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[18] This court in *Sim Seoh Beng* held that the amendment introduced to O 29 of the Rules of the High Court 1980 should not be construed as retrospective provisions. For ease of reference, we will reproduce in extenso the judgment of Gopal Sri Ram JCA (as he then was) where at pp 296–297, His Lordship said:

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> The traditional approach to the interpretation of statutes (which includes subsidiary legislation such as the Rules of the High Court 1980) in this area is contained in the general rule that, in the absence of express words or necessary implication, statutes affecting substantive rights are prospective while those affecting procedure are retrospective. In the case of rules of court, there is a rider to the general proposition. It is this. A rule of court should not be given an interpretation that would result in unfairness or produce a manifest injustice: *Bank of America v Chai Yen* [1981] 1 MLJ 198 at p 199 ...
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> The classification of a statute in general terms as procedural or substantive is singularly unhelpful; for a statute may at once be procedural for one purpose and substantive for another, depending upon the context in which it is being construed: *Maxwell v Murphy* (1957) 96 CLR 261; *In the Estate of Fuld (No 3)* [1968] P 675 at p 695; [1965] 3 All ER 776 at 779; [1966] 2 WLR 717 at p 734 per Scarman J; *Re Dosabhai Ardeshir Cooper* (1950) 52 Bom LR 625. It calls for a construction of the statutory provision as a whole: *Ramanathan Chettiar v Lakshmanan Chettiar* [1963] 1 Mad LJ 46 at p 50.
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> In our judgment, the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, prima facie that law must be construed as having prospective effect only, unless there is clear indication in the enactment that is in any event to have retrospectivity. Contra, where the written law does not affect substantive rights.

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[19] The learned JCA further said at pp 297–298:

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> We derive support for the view that we have expressed from the decision of the Privy Council in *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 (also reported in [1983] 1 MLJ 1). It was not referred to by either side to the learned judge in the present case. Neither is it mentioned in the *Malayan Banking Bhd v Siong Electronics Industries (1981) Sdn Bhd* which commended itself to the judge and appears to have greatly influenced him in coming to the conclusion that he did.
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> In *Yew Bon Tew*, the plaintiff was injured in a collision involving the defendant's vehicle. The accident occurred on 5 April 1972. The relevant time limit for instituting proceedings against the defendant was prescribed by s 2 of the Public Authorities Protection Ordinance 1948. As at the date of the collision, the section provided a period of 12 months. The plaintiff did not commence any action within the prescribed period. On 5 June 1974, that is to say a little more than two years after the collision and about a year after time had run against the plaintiff, Parliament enacted an amendment to the principal statute, extending

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the period of limitation to 36 months. On 20 March 1975, the plaintiff issued writ claiming damages for the injuries received by him in the collision of 5 April 1972. At the trial, the defendant raised a preliminary objection on the maintainability of the action. Mohd Azmi J ruled in the plaintiff's favour. The defendant appealed to the Federal Court which allowed the appeal and dismissed the suit. The plaintiff then appealed to the Privy Council which upheld the Federal Court and dismissed the appeal. Because of its importance, it is necessary to refer in extenso to the advice of the Board which was on that occasion delivered by Lord Brightman. This is what he said ([1983] 1 AC 553 at pp 558–559; [1983] 1 MLJ 1 at pp 2–3):

> A statute of limitation may be described either as procedural or as substantive. For example, in English law, at the expiration of the period prescribed for any person to bring an action to recover land, the title of that person to the land is extinguished. Such a limitation therefore goes to the cause of action itself. In most cases however the English Limitation Act only takes away the remedies by action or by set-off; it goes only to the conduct of the suit; it leaves the claimant's right otherwise untouched in theory so that, in the case of a debt, if the statute-barred creditor has any means of enforcing his claim other than by action or set-off, the Act does not prevent his recovering by those means. In this sense, the Ordinance of 1948 and the Act of 1974 are procedural: cf *Harris v Quine* (1896) LR 4 QB 653 and *Rodriguez v RJ Parker (Male)* [1967] 1 QB 116.
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> Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a Civil Appeal No W-02(W)-429–03/2016 new duty, or attaches a new disability, in regard to events already past. There is, however, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.
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> But these expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading. A statute which is retrospective in relation to one aspect of a case (eg because it applies to a pre-statute cause of action) may at the same time be prospective in relation to another aspect of the same case (eg because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself. (Emphasis added).

Later in his judgment he reiterated ([1983] 1 AC 553 at p 563; [1983] 1 MLJ 1 at p 5): Their Lordships consider that the proper approach to the construction of the Act of 1974 is not to decide what label to apply to it, procedural or otherwise but to see whether the statute, if applied retrospectively in a particular type of case, would impair existing rights and

obligations. (Emphasis added). I have laid emphasis on these last two passages because in them is the key to the whole problem that is now under investigation. It is an approach that was overlooked by the judge in the instant case.

[25] Coming back to the present appeal, when the plaintiff obtained judgment against the defendants on 7 February 2007, there was no period prescribed for the plaintiff to commence the assessment of damages. Applying the principles laid down by the Privy Council in *Yew Bon Tew* which were applied by this court in *Sim Seoh Beng*, and *RHB Bank Bhd*, the plaintiff had the substantive rights under the judgment and to hold that O 37 r 1(1) of the Rules of Court 2012 had a retrospective effect would result in unfairness, as it would impair the plaintiff's existing rights under the said judgment.

[26] As for the contention that the plaintiff must follow O 37 r 1(1) of the Rules of Court 2012 because the plaintiff itself has cited Rules of Court 2012 in its application, the answer is found in the passage quoted from *Yew Bon Tew* above, namely that 'A statute which is retrospective in relation to one aspect of a case … may at the same time be prospective in relation to another aspect of the same case'.

[27] In our judgment, the plaintiff was correct to make the application under Rules of Court 2012 as the Rules of the High Court 1980 were no longer in existence. In that aspect, the Rules of Court 2012 was to be applied retrospectively, ie in relation to the manner in which the plaintiff should proceed with the assessment of damages. However, in relation to preserving the rights of the plaintiff under the judgment, the Rules of Court 2012 should be applied prospectively. Flowing from the aforesaid, we were of the view that the plaintiff's failure to apply for an extension of time to pursue the assessment of damages was of no significance.

The judgment in *Berjasa Information System Sdn Bhd* is quoted in extenso as the underlying principles that would apply in this case are found therein and thoroughly explained.

[24] In this case, the plaintiff was adjudged as having the right to damages on 26 August 2011, at the time when the Rules of the High Court 1980 were applicable. Based on the authorities discussed above, the plaintiff was entitled to interest on the damages assessed from the date that judgment was entered ie 26 August 2011 and not from the date damages were assessed, which was on 21 January 2017. To my mind, this follows, as the plaintiff had secured a substantive right to damages on 26 August 2011 and the prevailing default rate of interest then was 8%pa. To hold that interest on the judgment debt should be 5%pa, that being the applicable rate at the time damages was assessed, would be unfair, unjust and inconsistent with the principles enunciated. Such would be to allow a prior substantive right acquired to be diminished by a subsequent rule of procedure albeit by way of subsidiary legislation. No other rate being specified either under the judgment or the order after assessment of

damages, the applicable interest rate would be the default rate under the Rules of the High Court 1980 ie 8%pa.

[25] By reason of the foregoing, the appeal was allowed with costs of RM500 as agreed to by learned counsel for the plaintiff, subject to 4% allocatur.

Appeal allowed with costs of RM500 subject to 4% allocatur.

Reported by Ahmad Ismail Illman Mohd Razali